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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

20 CR 412 (AT)

5 BRIAN KOLFAGE, STEPHEN BANNON,
6 ANDREW BADOLATO and TIMOTHY
7 SHEA,

8 Defendants.

-----x

9 New York, N.Y.
10 August 31, 2020
11 1:00 p.m.

12 Before:

13 HON. ANALISA TORRES,

14 District Judge

15 APPEARANCES (Videoconference)

16 AUDREY STRAUSS

17 Acting United States Attorney for the
Southern District of New York

18 ALISON MOE

NICOLAS ROOS

19 ROBERT SOBELMAN

Assistant United States Attorneys

20 SPRINGER & STEINBERG, P.C.

21 Attorneys for Defendant Kolfage

22 BY: HARVEY STEINBERG

23 QUINN EMANUEL URQUHART & SULLIVAN LLP

Attorneys for Defendant Bannon

24 BY: WILLIAM BURCK

DANIEL KOFFMANN

25 ALLISON McGUIRE

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APPEARANCES (Cont'd)

MAYER BROWN LLP

Attorneys for Defendant Badolato

BY: DANIEL STEIN

MICHAEL HEFFERNAN

MERINGOLO & ASSOCIATES, P.C.

Attorneys for Defendant Shea

BY: JOHN MERINGOLO

ALSO PRESENT: FRANCESCA TESSIER-MILLER, Pretrial Services

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(The Court and all parties appearing by video)

(Case called)

THE COURT: Good afternoon. Counsel, would you make your appearances, please.

MS. MOE: Good afternoon, your Honor, Alison Moe, Nicolas Roos and Robert Sobelman for the government.

MR. STEINBERG: Good afternoon, Judge, my name is Harvey Steinberg. I appear on behalf of Mr. Kolfage, who is also on the line.

THE COURT: Mr. Steinberg, I'm having difficulty seeing you. Maybe because of the light behind you, perhaps you could pull down the shade.

MR. STEINBERG: We're doing that as you speak.

THE COURT: That's much better.

MR. STEINBERG: Thank you.

THE COURT: Please go ahead.

MR. BURCK: Good afternoon, your Honor, this is William Burck, Daniel Koffman and Allison McGuire from Quinn Emanuel for Mr. Bannon, who is also present.

MR. STEINBERG: Good afternoon, your Honor, Daniel Stein and Michael Heffernan from Mayer Brown for Mr. Badolato, who is also present on the line.

MR. MERINGOLO: John Meringolo for Mr. Shea. He's also present.

THE COURT: This video conference is open to the

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1 public just as the courtroom would be, but as a reminder to
2 those who are listening in, photographing, recording or
3 rebroadcasting the proceeding is prohibited.

4 Each defendant has already submitted a form consenting
5 to this proceeding taking place by videoconference. I
6 understand that Mr. Bannon has been arraigned but that
7 Mr. Kolfage, Mr. Badolato and Mr. Shea have not. Is that
8 correct?

9 MS. MOE: Yes, your Honor, that's correct.

10 THE COURT: All right. Mr. Kolfage, Mr. Badolato and
11 Mr. Shea, you've been charged in an indictment with two counts:
12 One, conspiracy to commit wire fraud; and two, conspiracy to
13 commit money laundering, both in connection with the operation
14 of a fund-raising campaign called We Build the Wall.

15 I'm now going to ask you some questions. When I call
16 your name, please answer.

17 Have you been provided with a copy of the indictment,
18 that is, the written version of the charges against you,
19 Mr. Kolfage?

20 DEFENDANT KOLFAGE: Yes, your Honor, I have received
21 it.

22 THE COURT: Mr. Badolato?

23 DEFENDANT BADOLATO: Yes, I have received it.

24 THE COURT: Mr. Shea?

25 DEFENDANT SHEA: Yes, ma'am, I have received it.

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1 THE COURT: Do you want me to read it to you now in
2 open court or do you waive its public reading?

3 Mr. Kolfage?

4 DEFENDANT KOLFAGE: I do not need you to read it.

5 THE COURT: Mr. Badolato?

6 DEFENDANT BADOLATO: I waive the public reading.

7 THE COURT: Mr. Shea?

8 DEFENDANT SHEA: I waive the public reading.

9 THE COURT: With respect to the charges in the
10 indictment, how do you plead, Mr. Kolfage?

11 DEFENDANT KOLFAGE: Not guilty.

12 THE COURT: Mr. Badolato?

13 DEFENDANT BADOLATO: Not guilty.

14 THE COURT: Mr. Shea?

15 DEFENDANT SHEA: Not guilty.

16 THE COURT: I would like the government to give me a
17 report as to the status of bail.

18 MS. MOE: Yes, your Honor. On August 20 the Court set
19 bail conditions for defendant Steven Bannon. With respect to
20 the remaining three defendants, this appearance is their first
21 appearance in this district. We've conferred with defense
22 counsel and submitted proposed bail conditions for the Court's
23 consideration by letter. I would be happy to review those if
24 the Court would like me to, but they are substantially the same
25 conditions that we proposed by letter.

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1 THE COURT: I would like you to state them on the
2 record, please.

3 MS. MOE: Yes, your Honor. So with respect to
4 defendant Brian Kolfage, the parties jointly propose a \$500,000
5 personal recognizance bond, co-signed by two financially
6 responsible persons within two weeks.

7 The second condition would be a travel restriction
8 restricting travel to the Northern District of Florida, except
9 for travel to the Southern District of New York to attend
10 court, and travel to the District of Colorado to meet with
11 defense counsel, and all necessary points between for travel,
12 including travel by car.

13 The third condition is that the defendant must
14 surrender all passports and refrain from making any new
15 applications.

16 The fourth condition is supervision as directed by
17 Pretrial Services.

18 The fifth is that the defendant be prohibited from
19 raising funds on behalf of We Build the Wall or engaging in
20 financial transactions involving We Build the Wall's funds.

21 Sixth, that the defendant may not have any contact
22 with co-defendants or other individuals affiliated with We
23 Build the Wall, except in the presence of defense counsel.

24 Seventh, that the defendant shall not transfer any
25 real property or assets, encumber any real property or assets,

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1 or obtain any new lines of credit without permission of
2 Pretrial Services.

3 And eighth, the defendant may not possess firearms and
4 must surrender any firearms to Pretrial Services.

5 With respect to Andrew Badolato, the first proposed
6 condition is a \$250,000 personal recognizance bond cosigned by
7 two financially responsible persons within two weeks.

8 Second, travel restrictions to the Middle District of
9 Florida, the Southern District of New York for purposes of
10 meeting with the defense counsel or attending court, the
11 District of Columbia for purposes of meeting with defense
12 counsel, and all necessary points between for travel, including
13 travel by car.

14 Third, the defendant must surrender all passports and
15 refrain from making any new applications.

16 Fourth, supervision as directed by pretrial services.

17 Fifth, the defendant is prohibited from raising funds
18 on behalf of We Build the Wall or engaging in financial
19 transactions involving We Build the Wall's funds.

20 Sixth, that the defendant may not have contact with
21 co-defendants or other individuals affiliated with We Build the
22 Wall, except in the presence of defense counsel.

23 And seventh, the defendant may not possess firearms
24 and must surrender any firearms to Pretrial Services.

25 Finally with respect to Timothy Shea, the first

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1 condition we propose is a \$250,000 personal recognizance bond
2 cosigned by two financially responsible persons within two
3 weeks.

4 The travel restrictions are the District of Colorado,
5 the Southern District of New York for the purposes of attending
6 court and meeting with defense counsel, and all necessary
7 points between for travel, including travel by car.

8 We propose that the defendant must surrender all
9 passports and refrain from making any new applications.

10 We propose supervision as directed by Pretrial
11 Services.

12 We propose that the defendant is prohibited from
13 raising funds on behalf of We Build the Wall or engaging in
14 financial transactions involving We Build the Wall's funds.

15 We propose that aside from the defendant's spouse, the
16 defendant may not have contact with co-defendants or other
17 individuals affiliated with We Build the Wall, except in the
18 presence of defense counsel.

19 And finally, that the defendant not possess firearms
20 and must surrender any firearms to Pretrial Services.

21 THE COURT: Having heard these proposed conditions and
22 having considered the factors set forth in 18, United States
23 Code, Section 3142(g), I find that the agreed-upon conditions
24 of release reasonably assure that the defendants will appear
25 for future court appearances. Accordingly, I approve the

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1 conditions for Mr. Kolfage, Mr. Badolato and Mr. Shea.

2 Now let me warn you, and I'm speaking to the
3 defendants, that if you fail to appear when required or if you
4 violate any of the conditions of your release, a warrant will
5 be issued for your arrest, you may be detained pending trial,
6 you and anyone who signed the bond will be responsible for
7 paying the full amount of the bond, and you may be charged with
8 a separate crime of bail jumping.

9 Do you understand, Mr. Kolfage?

10 DEFENDANT KOLFAGE: Yes, your Honor.

11 THE COURT: Mr. Badolato?

12 DEFENDANT BADOLATO: Yes, your Honor.

13 THE COURT: Mr. Shea?

14 DEFENDANT SHEA: Yes, your Honor.

15 THE COURT: I understand that Mr. Bannon has already
16 received the same warning. Of course, those rules continue to
17 apply.

18 I understand that an officer with pretrial is also
19 present on the call. Ms. Tessier-Miller, is there anything
20 that you would like to say?

21 MS. TESSIER-MILLER: Not at this time, your Honor.

22 THE COURT: All right. Let me set a trial date. Here
23 in the Southern District of New York there are only a few
24 courtrooms that are outfitted to deal with the challenges posed
25 by the Covid pandemic, so I am not a hundred percent certain

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1 whether we will go forward on the date that I am going to set
2 today, but I am going to be optimistic and hope that we have
3 courtrooms available.

4 May 24, 2021 is the date that I would like to set.

5 (Pause)

6 THE COURT: So I haven't heard any objections to that
7 date, so that is the date that we will go forward.

8 I would like to get a report concerning discovery.

9 MS. MOE: Yes, your Honor. With respect to discovery,
10 the government intends to seek a protective order before
11 producing discovery in this case, given the sensitive materials
12 that will be contained in our discovery production. We intend
13 to --

14 THE COURT: I'm sorry, would you repeat that, please?

15 MS. MOE: Yes, your Honor. The government intends to
16 seek a protective order before producing discovery, given the
17 sensitive materials that will be contained in our production.
18 And so it's our intention to confer with defense counsel, and
19 we hope to submit a proposed protective order promptly so that
20 discovery productions can begin.

21 Following the entry of a protective order, we will
22 produce the following materials promptly in five categories:
23 The first is all search warrants and affidavits; the second is
24 all subpoena returns; the third is public source information
25 that the government has gathered; the fourth is responsive

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1 material from a January search warrant for a number of email
2 accounts and cloud storage accounts; and finally, in addition
3 to responsive material from that warrant we also intend to
4 produce to each defendant their own complete account.

5 THE COURT: By what date do you expect all those
6 materials will be produced?

7 MS. MOE: For this initial wave of materials, which
8 will be voluminous, we would ask for three weeks to produce
9 these materials following the entry of a protective order.

10 There is a second category of information which I
11 would be happy to address following the production of our first
12 batch.

13 THE COURT: When do you think you'll reach agreement
14 on the protective order?

15 MS. MOE: Your Honor, our hope is to circulate a
16 protective order either today or tomorrow and then confer with
17 defense counsel. So it just depends on whether there are any
18 issues. The terms we intend to propose are fairly standard, so
19 we hope that there won't be any issues with resolving that, but
20 of course we'll need to confer with defense counsel about those
21 terms before submitting it to the Court. But our hope is to do
22 so promptly as soon as we are able to discuss it with defense
23 counsel.

24 THE COURT: And then you said you expect the first
25 wave of discovery to come three weeks thereafter, correct?

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1 MS. MOE: Yes, your Honor. And that's largely to
2 account for the mechanics of producing a large volume of data.

3 THE COURT: So I am going to expect that the
4 protective order will be finalized by the 8th of September,
5 next Tuesday, and that the first wave of production will happen
6 by the 29th of September.

7 MS. MOE: Yes, your Honor.

8 THE COURT: Now you said there's a second wave?

9 MS. MOE: Yes, your Honor. Following this initial
10 production, which will be voluminous, we intend to produce
11 additional materials as they become available to the
12 government. So we intend that the first wave will include all
13 materials which are available to the government in the
14 categories that I've outlined.

15 Following that initial production we will produce
16 additional materials as they become available to us. In
17 particular, your Honor, in July and August the government has
18 seen several email device and premises search warrants, and
19 some of those email accounts have not yet been received from
20 the service providers, and the devices have not yet been
21 forensically imaged, so when we receive that data we'll provide
22 copies to the owners of the accounts or device and then make
23 productions on a rolling basis following a privilege review and
24 a responsiveness review.

25 In our view, producing these materials on a rolling

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1 basis as they become available to the government is the fastest
2 way to get those materials to defense counsel. And we do not
3 believe that this will delay any motion practice, given that we
4 are producing all of the accompanying affidavits and search
5 warrants for those materials promptly.

6 THE COURT: So when do you think that all of the items
7 will be delivered to defense?

8 MS. MOE: Your Honor, it's difficult to give a firm
9 estimate given that much of the material is not available to
10 the government, so there is a variable beyond our control and
11 it's difficult to project how long the privilege review would
12 take. But we intend to produce those on a rolling basis, so we
13 will propose either setting a check-in date to alert the Court
14 about the status of discovery or a follow-up conference,
15 whatever the Court's preference is, but we would be happy to
16 keep the Court updated on the progress of those rolling
17 productions.

18 THE COURT: Do you have the sense that you will be
19 able to produce these items by the 30th of October?

20 MS. MOE: It would be difficult to give an estimate,
21 your Honor, I apologize. We would be happy to submit a letter
22 in the coming weeks when we have a better sense of the timeline
23 for extracting devices and reviewing materials from a
24 third-party provider. At this date we don't yet know which
25 devices we'll be able to get into, whether there will be

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1 password issues or other encryption problems which might delay
2 the extraction of some of those materials, but if it's
3 acceptable to the Court, we would be happy to submit status
4 letters on those issues.

5 THE COURT: I would like to set a date for a status
6 conference, October 26 at 1:00 p.m. And yes, I would like to
7 hear about the progress of discovery.

8 MS. MOE: Yes, your Honor.

9 THE COURT: On August 28 the government submitted to
10 me a letter indicating that Mr. Kolfage has made a number of
11 statements on social media concerning this case. Under Local
12 Criminal Rule 23.1, lawyers appearing in criminal proceedings
13 before the Court have a duty to refrain from public statements
14 outside of court that have a substantial likelihood of
15 interfering with a fair trial or prejudicing the due
16 administration of justice.

17 So that there's no confusion, I am now going to give
18 you some examples of those types of statements: Statements
19 about the prior criminal record including arrest, indictments
20 or other charges of crime, or the character or reputation of
21 the accused; statements about the existence or contents of any
22 confession, admission or statement given by the accused, or the
23 refusal or failure of the accused to make any statement;
24 statements about the identity, testimony or credibility of
25 prospective witnesses; statements about the possibility of a

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1 plea of guilty to the offenses charged or lesser offenses;
2 information a lawyer knows is likely to be inadmissible at
3 trial, and would, if disclosed, create a substantial likelihood
4 of prejudicing an impartial trial; any opinion as to the
5 accused's guilt or innocence or as to the merits of the case or
6 the evidence in the case. If I could fill in that public
7 statements by attorneys or by the defendant threaten the
8 Court's ability to conduct a fair trial by an impartial jury.

9 Local Rule 23.1 also gives me the authority to issue a
10 special order prohibiting the parties from making those
11 statements or using certain modes of communication. If any
12 party in this case makes a statement that risks tainting the
13 impartiality of potential jurors or otherwise calls into
14 question the fairness of these proceedings, I will exercise
15 that authority.

16 Do you understand, Mr. Kolfage?

17 DEFENDANT KOLFAGE: Yes, your Honor.

18 THE COURT: Mr. Bannon?

19 DEFENDANT BANNON: Yes, your Honor.

20 THE COURT: Mr. Badolato?

21 DEFENDANT BADOLATO: Yes, your Honor.

22 THE COURT: Mr. Shea?

23 DEFENDANT SHEA: Yes, ma'am.

24 THE COURT: Are there any further applications?

25 MR. STEINBERG: Yes, Judge. May I address what the

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1 Court has just raised? This is Harvey Steinberg on behalf of
2 Mr. Kolfage.

3 THE COURT: You may.

4 MR. STEINBERG: Thank you. By definition, 23.1 does
5 not apply to the defendants unless the Court conducts a special
6 proceeding. And that's been reaffirmed not only by the rule,
7 but also by the case of *United States v. Gotti*, which came out
8 of the Southern District, it's a 2004 case and could be found
9 at 2004 U.S. District Lexis 24192.

10 The concern that I make is this: The government in
11 this case is the only entity that has violated the rules.
12 Specifically, in the list that the Court cited, Number 7 is the
13 one that was violated. The government in this case issued a
14 press release, it was co-authored, apparently, or approved
15 explicitly by the U.S. Attorney herself and the agent in charge
16 of this investigation. The U.S. Attorney is quoted as saying
17 about my client that he used the funds for his lavish
18 lifestyle. That has nothing to do with this case. It's a
19 violation of Number 7.

20 What's even worse is the agent who was in charge of
21 this is quoted as saying, "This case should serve as a warning
22 to other fraudsters" -- his terms -- "that no one is above the
23 law, not even a disabled war veteran," in reference to my
24 client. For the government to file that letter after they set
25 forth a false and inappropriate narrative and then say that the

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1 defendant shouldn't have his First Amendment rights pursuant to
2 a rule that is not applicable at this point, we take exception
3 to the government's conduct. And then for them to say hey,
4 look, we're not going to make any further statements is
5 specious at best, because they have created a narrative that is
6 being repeated by the press. Their quotes are out there.

7 So I have concern that the government who -- it
8 reminds me of the bully who picks on, if you will, the person
9 who he perceives to be the weakest, and then when the weakest
10 hits him back he runs to the teacher. I am concerned that the
11 government has set forth this complaint about Rule 23 that
12 doesn't apply at this point and won't apply unless the Court
13 specifically I think has to have a hearing pursuant, the way I
14 read the rule, to 1(h). And then the Court has to conduct a
15 hearing to determine whether or not anything my client has said
16 pursuant to his First Amendment rights has impacted the
17 impartial jury selection process.

18 The only entity that has done that so far is the
19 government, and I just wanted to make clear on the record that
20 we don't think it's fair for the government to take the shot
21 over the bow and then when there's an attempt to respond
22 appropriately -- and let me be clear, Judge, I, as a lawyer, am
23 aware of 23.1. I have not made any statements whatsoever. I
24 have not cajoled, interpreted, suggested or helped the
25 defendant crafting any statements. But in fairness, we can't

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1 have a situation where the government takes shots and basically
2 calls my client a fraudster and says he was living this lavish
3 lifestyle, and then when we don't even attempt, if you will, to
4 deal with the facts, which they did in violation of the rule
5 that applies to them, come forward and complain we think is
6 inappropriate. And I just want that to be part of the record,
7 Judge. That's our concern.

8 THE COURT: I will hear from the government.

9 MS. MOE: Thank you, your Honor. First, just so we
10 understand the procedural context of the government's
11 application, as we were clear in our letter, we have not asked
12 the Court to issue an order at this point. We brought these
13 issues to the Court's attention, as we brought them to
14 counsel's attention, in order to make clear that the
15 expectations were that everyone would comply with Local
16 Rule 23.1. And that's all we've asked the Court to do, which
17 the Court has done today. So the government has not sought an
18 order in this case under Rule 23.1.

19 With respect to the substance of defense counsel's
20 allegations, the government issued a press release in this
21 case, which is standard. That press release tracked the
22 allegations in the indictment, and the government submits that
23 it's entirely appropriate and commonplace in this district.
24 The government did not have a press conference or anything
25 beyond issuing a press release in this case, which was entirely

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1 appropriate.

2 What troubles the government are statements by a
3 defendant on social media intended to be broadcast to victims
4 in this case and donors suggesting that the government will be
5 targeting the donors and using their personal information for
6 nefarious purposes. That deeply concerns the government, and
7 that's why we brought this to the Court's attention, and we
8 appreciate the Court advising the parties of its expectation
9 that everyone will comply with Local Rule 23.1.

10 As we outlined in our letter, the government does not
11 intend to issue any other further public statements with the
12 exceptions outlined in our letter, and we fully intend to
13 comply with Local Rule 23.1, and we appreciate the Court
14 advising the parties of its expectation that they will do the
15 same.

16 THE COURT: Well, I just asked the defendants if they
17 understood what I said and they said that they did. I know
18 that the attorneys understand the rule, and so my expectation
19 is that there will not be violations of the rule. If I have to
20 hold an additional proceeding to determine whether the rule has
21 been violated, well, we shall see.

22 Are there any further applications?

23 MR. STEINBERG: Not on behalf of Mr. Kolfage. Thank
24 you.

25 MR. BURCK: Not on behalf of Mr. Bannon, your Honor,

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1 thank you.

2 THE COURT: Is there a motion for me to exclude time
3 under the Speedy Trial Act?

4 MS. MOE: Yes, your Honor. The government has an
5 application under the Speedy Trial Act. Before addressing
6 speedy trial matters, your Honor, we did want to raise one
7 additional matter today before concluding.

8 Your Honor, we're not seeking any relief today, but we
9 did want to make the Court aware that the government has been
10 in communication with Mr. Bannon's defense counsel to discuss
11 whether there may be a potential conflict in this case, given
12 that the law firm of Quinn Emanuel previously represented We
13 Build the Wall. we've asked defense counsel to provide us some
14 additional information about the scope of that representation,
15 and our intention is to submit a letter to the Court addressing
16 that issue and potentially requesting a Curcio hearing. So
17 we're not asking for any relief today, but we did want to make
18 the Court aware that we intend to raise that issue soon.

19 But aside from that issue, there are no issues from
20 the government aside from asking the Court to exclude time
21 under the Speedy Trial Act. We ask the Court to exclude time
22 between today and the trial date in order for the parties to
23 discuss a potential protective order, for defense counsel to
24 review discovery, and possibly any motions.

25 THE COURT: Any objection?

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1 MR. BURCK: Your Honor, no objection from Mr. Bannon.
2 I would like to briefly respond to the government's potential
3 request for a Curcio.

4 THE COURT: Go ahead.

5 MR. BURCK: Thank you, your Honor. The government is
6 correct, they have let us know that they would like to get more
7 information about prior representation by Quinn Emanuel of We
8 Build the Wall. And just to be specific, your Honor, there
9 were two lawyers at our firm, not people who currently
10 represent Mr. Bannon, not myself or my colleagues, who did a
11 very limited amount of work for We Build the Wall in October
12 and November of last year. It was a partner who did about six
13 hours of work and an associate who did about eight hours of
14 work. That's the basis for the potential conflict.

15 We have told the government that we would not object
16 to a Curcio hearing. It would be fine with us. We already
17 talked to our client about it. We're in the process of talking
18 to the other defendants about it as well, as well as We Build
19 the Wall. So in the event the government does request a
20 Curcio, we will not object, and we will work with the
21 government again.

22 We don't think this is a significant issue, though,
23 for a couple of reasons; one is we expect that any conflict
24 will be waived by all the parties. And again, even to the
25 extent that there was a prudential reason to keep the people

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1 who worked the limited amount of 14 hours of work for We Build
2 the Wall last year, they're not currently and we don't intend
3 to have them on the trial team. So again, we think there are
4 many ways to handle that issue, but we will work with the
5 government and come back to you as soon as we can.

6 THE COURT: All right. So time is excluded under the
7 Speedy Trial Act through May 24, 2021, having heard no
8 objections from counsel. I find that the ends of justice
9 served by excluding such time outweigh the interests of the
10 public and the defendants in a speedy trial because this will
11 allow time for the prosecution to finish producing discovery,
12 for the defense to consider it and decide whether to file
13 motions, and for the parties to discuss a possible disposition.

14 That brings our conference to a close. The matter is
15 adjourned. I wish you all good health.

16 (Adjourned)
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